

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1104 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

SHARJAHAN @ MUNNO BACHUBHAI JUNEJA (SANDHI)

Versus

COMMISSIONER OF POLICE

Appearance:

MS DR KACHHAVAH for Petitioner

Mr. Kamal Mehta, AGP for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 05/05/98

ORAL JUDGEMENT

The petitioner is kept under detention passing the order of detention on 23rd November 1997 under Section 3(2) of the Gujarat Prevention of Anti-Social Activities Act, 1985 (for short "the Act"). The petitioner therefore challenges the legality and validity of that order passed by the Police Commissioner for the city of Rajkot and prays for setting him at liberty.

2. The facts which led the petitioner to prefer this

application may, in brief, be stated. The petitioner was considered to be the head-strong person. In the city of Rajkot about three complaints with Pradhumannagar police station came to be lodged against the petitioner. As alleged in first 2 complaints he committed the offence punishable under Section 324 of IPC by voluntarily causing hurt to the complainant and others giving knife blows. As alleged in third complaint pelting brick-bats and giving sword blows the petitioner caused the injury and committed the offences punishable under Section 341, 337, 336, 506 Part II, 504, 427 read with Section 114 Indian Penal Code and Section 135 of the Bombay Police Act. The Police Commissioner perusing such record found that the petitioner was committing several offences and was terrorising the people. He by force asked the people to bend his way, help him and succumb to his desire or wish & commands. Any one who resisted was brutally dealt with and had to face the dire consequences. The people feeling insecure were in helplessness tolerating and suffering miseries and woes that resulted from the wrong done by the petitioner. The petitioner was keeping knife and such other lethal weapons and at the point of such weapons he was terrorising the people and wielding his sceptre. His nefarious and subversive activities disturbing the public order were going berserk and his activities were required to be curbed immediately by taking appropriate action in the matter. The Police Commissioner on cogitation realised that any action under the general if taken would be the futile exercise as no meaningful purpose would be served. According to him, the only way out was to pass the order in question and detain the petitioner. In the result, the order came to be passed and at present the petitioner is kept under detention.

3. The order is challenged on several grounds and both submitted to pass the order favouring them, but when the query was made, the learned advocates representing the parties tapered off their submissions confining to the only point namely exercise or privilege under Section 9(2) of the Act. According to the petitioner, the privilege for not disclosing the particulars about the witnesses was not rightly exercised. For want of those particulars he was not able to point out how those statements were not reliable. No doubt, under Section 9(2) the authority has the privilege but the same must be exercised sparingly and in rare cases after satisfying fully that the fear expressed by the witnesses is genuine, honest and not imaginary or an empty excuse. As in this case, the right to make effective representation for want of particulars has been jeopardised, the order

in question may be quashed holding that the detention is illegal.

4. In reply to such contention, Mr. K.M. Mehta, the learned AGP submitted that reading the order it would appear that the Police Commissioner has considered all relevant factors. Keeping in mind the retaliatory tendency of the petitioner, the particulars about the witnesses were suppressed. When to protect the safety of the witnesses, the privilege was exercised, the order cannot be held bad.

5. It would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases, where public interest dictating non-disclosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the

detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference of a decision in the case of Bai Amina, W/o. Ibrahim Abdul Rahim Alla Vs. State of Gujarat and others- 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujarat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

6. In view of such law, the authority passing the detention order has to file the affidavit explaining in details how and under what circumstance the privilege exercised is just. In this case, no such affidavit is filed by the detaining authority. It should therefore be assumed that in fact there was no just cause to exercise the privilege assuming retaliatory tendency and withhold the particulars. What factors were considered is not shown. The petitioner was, therefore having a right to have those particulars for making effective representation. When those particulars are not given, his such right is jeopardised and therefore his continued detention must be held to be illegal. What appears from the copy of the order produced is that the Police Commissioner entrusted the task of enquiry to the competent officer working under him. He then accepted the report, may be because of the trust he had reposed but he has as per the above referred decision, not considered the report qua the general background, character, antecedents, criminal tendency or propensity etc., of the detenu and such other factors relevant in

the context. The subjective satisfaction is therefore vitiated. The order of detention therefore cannot be maintained as the privilege is not justly exercised.

7. For the aforesaid reasons, the application is allowed. The order of detention dated 23rd November, 1997 is hereby quashed and set aside. The petitioner is ordered to be set at liberty forthwith if not required in any other case. Rule accordingly made absolute.

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(rmr).